GOVERNMENT BY LAWYERS.

ADDRESS BY S. D. THOMPSON.

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GOVERNMENT BY LAWYERS.[1]

In the ruder stages of human development the offices of military leader, legislator, magistrate, priest, and physician, are often united in one person; of which we see instances in the Angekok of the Esquimaux, and the medicine-man of our native tribes. As mankind progresses in its development, each of these offices becomes more complicated and requires for its ministry a longer study, a more patient application, and a more varied experience; each, therefore, demands for its successful prosecution, all the time and strength of its incumbent; and in the general division of labor and exertion, each falls to the lot of single individuals, who, in time, form a separate class in the body politic. In the public opinion of vital nations, the general, the man whose skill and courage leads the people to military successes, stands first in the public estimation: it is only in decaying civilizations, like that of China, that the scholar is preferred before the soldier. Next in importance to the soldier, in every vital State, stands the lawyer, the man who makes, expounds, and administers the laws. Behind him, with hourly diminishing importance, comes the priest, the clergyman, the man whose profession is supposed to concern our relations with the eternal world; a profession which, though in past ages clouded with superstition and stained with crime, has been rendered luminous with a long array of saints, martyrs, and philanthropists. A subdivision of the same profession, from the condition which it occupied in the ealier stages of human development, brings immediately behind him that profession which, though perhaps the least obtrusive, is not the least useful of any, which abounds in noble and gifted men, whose whole lives, careless of gain and of self, are devoted with disinterested

[1] An address delivered by Seymour D. Thompson before the Bar Association of Texas, at Galveston, on July 30, 1896. See this address referred to in our department of "Notes" in this number.—EDS. AM. LAW REV.

zeal to the advancement of human knowledge and the mitigation of human suffering.

In the monarchical stages of government, the first and third of these professions, that of the soldier and the priest, have combined to tyrannize and oppress mankind; and the human family have been weighted down for ages by a double tyranny which it has seemed impossible to lift, — the terrors of superstition and the power of the sword. Government by the priest alone has been long endured by mankind, and has not been found the worst of human government. Laws based upon religion, and religion associated with morals and with justice, and justice administered, as in the Jewish Sanhedrim, in the presence of God himself, and consequently without the aid of lawyers, have been, in ruder ages, a much more tolerable kind of government than the mere caprice of the sword. But when the priest forgot the sanctities of his holy office, and lent himself to the aid of the military despot, mankind discovered that the most grievous of all governments, the hardest to be borne, and the hardest to shake off, was a government of the soldier and the priest combined.

You men of Texas conquered your liberties from such a government; and in your Declaration of Independence, adopted on the second day of March, 1836 — a day which ought forever to be a sacred holiday in Texas — you emphasized your unalterable opposition to such a government, in language that will go sounding down the ages. You charged that 'the Federal republican constitution of your then country — that is, of the Republic of Mexico — which you had sworn to support, no longer had a substantial existence; that the whole nature of your government had been forcibly changed, without your consent, from a restricted, federative republic, composed of sovereign States, to a consolidated, central military despotism, in which every interest was disregarded but that of the army and the priesthood, *both* the eternal enemies of civil liberty, the ever-ready minions of power, and the usual instruments of tyrants.'[1] You charged that the Mexican nation, in the late changes made in the government by General Antonio Lopez de Santa Anna, who, having

[1] Declaration of Independence of the Republic of Texas, adopted in the general convention at Washington, Texas, on March 2d, 1836.

overturned the constitution of his country, now offered you as the cruel alternative, either to abandon your homes, acquired by so many privations, or to submit to the most intolerable of all tyranny, the combined despotism of the sword and the priesthood.[1] You arraigned the Mexican government for denying to you the right of worshiping the Almighty according to the dictates of your consciences, by the support of a national religion, calculated to promote the temporary interest of its human functionaries, rather than the glory of the true and living God.[2] For these and other enumerated grievances you Texans, by that immortal instrument, severed your political connection with the Mexican nation, declared yourselves to be a free and independent republic, and, 'conscious of the rectitude of your intentions, you fearlessly and confidently committed the issue to the Supreme Arbiter of the destiny of nations.'

That great first charter of your liberties was undoubtedly drawn by the hand of a lawyer.[3] The members of the legal profession, always conspicuous as public leaders, played a most important part in your struggle for independence. They commanded your companies, your regiments, and your expeditionary forces. Sam Houston, who commanded your Army of Liberation on the field of San Jacinto, where you defeated and took prisoner the Mexican Dictator, and finally achieved your independence, — was a lawyer no less than a soldier. Nor, after you had achieved your independence, were you unmindful of the legal profession in bestowing civic honors. Fourteen of your counties are named for distinguished judges. Shall I call that roll of honor? Their names are Collingsworth, Donley, Ector, Gray, Handsford, Hemphill, Hutchinson, Lipscomb, Mills, Ochiltree, Oldham, Wheeler, Wilson, Winkler. A still greater number, perhaps, bear the names of distinguished lawyers who never ascended the judicial bench, but who rendered important services to their country in its struggle for independence, and in its subsequent political development. In your last legislature, in a House of Representatives composed of 128

[1] *Ibid.*, § 3.

[2] *Ibid.*, § 12.

[3] It was drawn by George G. Childress, after whom Childress County, in the State of Texas, is named.

members, 51 were lawyers. In a Senate composed of 31 members, 22 were lawyers. And your Governor, Secretary of State, Attorney-General, Railroad Commissioners, and Land Office Commissioner, are all lawyers.

These digressions into historical facts, which have a peculiar and tender meaning for you Texans, will serve to illustrate the dual truth that no species of human government is more oppressive and more odious than the combined government of the priest and the soldier; and that lawyers, among our race at least, always play a conspicuous part in struggles for liberty. Lawyers have always been an inconvenience to despots. The tyrant is continually stumping his toe against the lawyer. Napoleon, the son of a lawyer, hated lawyers. When he first conspired to overturn the government of France, to drive out the legislature, and to make himself master of the liberties of his country, his proposition to his military co-conspirators was to clean out the lawyers.

Shall I extend this field of illustration? The Magna Charta, which the barons extorted from King John at Runnimede, was undoubtedly written by lawyers. It was a lawyer who first, in our ancestral country, disputed the doctrine that the king was above the law, and whose undaunted courage gave us that second charter of liberty, the Petition of Right.[1] It must have been a lawyer who drew the celebrated Habeas Corpus Act. It must have been a lawyer who drew the celebrated statute, 1 Wm. and Mary 1, which settled the succession of the crown on its modern basis and declared the rights of the subject,— a statute from which the first eight amendments to the Federal constitution, placed there through the influence of Mr. Jefferson, were drawn, and whose essential provisions are embodied in the Declaration of Rights in every American State constitution. It was a lawyer who drew the Declaration of Independence, promulgated by the Congress of the thirteen British North American colonies on the Fourth of July, 1776.[2]

[1] Sir Edward Coke.

[2] Thomas Jefferson, the author of that immortal instrument, was not only a lawyer, but, in a small way, a court reporter; and "Jefferson's Reports," a small volume, will repay perusal by the learned and curious.

It was Gambetta, a lawyer, who proclaimed the present French Republic in 1870. If the convention which framed the constitution of the United States, at once the greatest and the briefest political code that was ever written,— the greatest instrument, as was said by Mr. Gladstone, that was ever thrown off at a dash, so to speak, by the hand of man,— if that convention was presided over by a soldier, we have the testimony of "Elliott's Debates" for the conclusion that its work was almost entirely the work of lawyers. And it may be truly said that that remarkable instrument, which established a government acting directly upon the people, which committed to the general government those matters which could not be safely or conveniently left to the separate States, and which reserved to the separate States those liberties which could not be safely or conveniently surrendered to the general government,—was the work of a collection of able and patriotic lawyers of that early day, who proceeded without model and almost without precedent. The same is true of all our State constitutions: they have been eminently the work of lawyers. While agriculture, commerce, manufactures, the arts, and literature have all been to some extent represented in our constitutional conventions, yet the representatives of these interests have occupied positions entirely subordinate to the positions occupied by the lawyers,— positions analogous to that of lay judges in Pennsylvania and New Jersey: they were there to be consulted on questions of fact merely, and were to nod their heads when the lawyers spake.

Our Federal constitution was, as I have said, almost exclusively the work of lawyers. But it would have been destitute of all symmetry, and would have been but partially efficacious, if its interpretation had been left to the irregular and turbulent action of legislative bodies. It became, then, unavoidably necessary that its authoritative and final interpretation should be committed to that department of the government which, by reason of its learning, its open, orderly, and dignified methods of procedure, its habit of hearing argument in all cases before deciding, and of publishing the reasons for its decisions,— but, above all, by reason of the independence of its members from the other branches of the government, and even from the peo-

ple themselves, — because of the permanency of the tenure of their offices, — was alone suited to the performance of so great a task. It is true that the office of supreme interpreter of the constitution was never, by that instrument itself, committed to the Supreme Court. On the other hand, the little in the constitutional convention on the subject which has come down to us indicates a purpose to withhold it.[1] But the office was imposed upon the court by an overwhelming and unavoidable logic. Its judges were, in conformity with the constitutional mandate, sworn to support the constitution, and they were not sworn to support acts of Congress. Whenever, therefore, in the exercise of their granted jurisdiction, they might be driven to a choice between upholding an act of Congress and upholding the constitution, their oaths of office, prescribed by the constitution itself, obliged them to uphold the latter. Moreover, the constitution was a most solemn instrument, which did not become binding until ratified by three-fourths of the States; nor could it be amended without the consent of a like proportion of the States. But how trivial would the instrument have become if it could have been amended, or in part repealed, or disregarded, by a bare majority of the two houses of Congress, with the concurrence of the executive, in times of turbulence or popular excitement. The duty of the court, then, although never expressly enjoined upon it, when exercising its regular and proper jurisdiction, to refuse to enforce an act of Congress, or an act of a State legislature, which is plainly opposed to the national constitution, seems as unavoidable as a syllogism in logic or a theorem in geometry. This power on the part of the judicial branch of the government to set aside unconstitutional acts of legislation was not assumed without challenge; nor was it assumed for the first time by the Supreme Federal Tribunal: several State decisions asserted the power prior to the time when it was declared to exist by the Supreme Court of the United States in the case of *Marbury* v. *Madison*.[2] The exercise of the power, hav-

[1] See an article on this subject by Gov. Pennoyer, in 29 Am. Law Rev. 856.

[2] See an instructive article by Robert Ludlow Fowler, 29 Am. Law Rev. 711, 722.

ing been vindicated by Chief Justice Marshall in that celebrated case, in language which, although possibly *obiter*, stands to this day unanswered and unanswerable, was asserted in turn by the highest judicatories of the States; and it has become so firmly embodied in our American constitutional jurisprudence, that it is not likely to be disturbed at any near period in the future.

An obvious abuse of the power has exacted more attention and deserved more reprobation. One of the fundamental conceptions of our national constitution was an entire independence of the three departments of the government, each from the control or influence of the others. Following the doctrines of [illegible], the framers of that instrument sought in that way to create a government of checks and balances, taking the just view that such a government would be more favorable to liberty. The legislative power was committed to the two houses of Congress, with a limited concurrence on the part of the executive. The appointment of public officers and the conduct of foreign relations were committed to the concurrent action of the President and the Senate. The administration of public and private justice was vested in the Judiciary. To remove this branch of government, as far as possible, from the control of the other two, the judges were to be appointed during good behavior and their compensation was not to be diminished during their terms of office.[1] Beyond all question, it was intended to divide the powers of government into three independent departments, working in harmony, mutually supporting each other, and yet each independent of the others. This plan has been imitated in all our State constitutions; it has been imitated in the constitution of the federative republic which lies on our Southern border; and if there is anything which may be said to be axiomatic in American constitutional law, it is the proposition that neither of the three departments of government can rightfully interfere with the workings of either of the others.[2] It is to be profoundly regretted that this salutary principle was first violated by the

[1] Const. U. S. Art. 3, § 1.

[2] See the striking language of the Supreme Court of the United States on this subject in Kilbourn *v.* Thompson, 103 U. S. 168, 190, *et seq.*

judicial department in the case of *Marbury* v. *Madison*,[1] already referred to. The power was there asserted on the part of the judicial branch of the government to direct coercive process against officers of the President's cabinet — in effect against the President himself — to compel the doing of acts that were regarded as ministerial merely. The Supreme Court, while disclaiming such jurisdiction for itself,— since, with certain limited exceptions, it had appellate jurisdiction only,— asserted it for the inferior Federal judicatories; and its exercise was attempted by them, but was successfully resisted by President Jefferson, and, in my judgment, rightfully resisted. But, following the doctrine of this decision, or rather of this extra-judicial fulmination,— for the court had really nothing to decide except its own want of jurisdiction to decide anything, — the State judicatories have, almost without exception, asserted the power to control the action of the executive department of their State governments in what are called ministerial matters, that is, matters which do not involve the exercise of an exclusive discretion, by sending writs of mandamus to the heads of executive departments, and even in some instances, to the Governor himself. It is true that no Federal judicatory has yet sent its writ of mandamus or of certiorari to the President of the Senate, or to the Speaker of the House of Representatives: that is yet to come, in the manifest and steady progress of usurpation. The Federal judiciary have found other means with which to lay their coercive hands upon the legislative department of the government, even to the extent of restraining the houses of the National Legislature in the just exercise of their powers.

Within a recent period we have seen and applauded the coercion of the House of Representatives of the United States by an action at law brought against its Sergeant-at-Arms in a local court of the District of Columbia, to recover damages for a false imprisonment, consisting in the mere fact of an arrest by that officer under a warrant issued by the Speaker of the House in compliance with a resolution of the House, to compel the attendance and coerce the testimony of a recusant

[1] 1 Cranch. 137.

witness, in a case where it was sought to investigate an alleged fraudulent bankruptcy of a debtor to the United States.[1] Instead of resisting an encroachment by another branch of the government upon powers which had belonged to each of the houses of the British Parliament time out of mind,—which were always regarded as a part of the *lex parliamenti* or common law of Parliament, and which had been inherited by the two houses of our National Legislature, the Senate, instead of asserting its right to punish a contempt against its own dignity and authority, tamely remitted the vindication of its dignity and honor to a prosecution by indictment in a local court of the District of Columbia.[2] The spectacle was no less than that of witnesses who had refused to testify before an investigating committee of the American Senate, in a case where it was alleged that senators had been bribed and corrupted by the so-called Sugar Trust, being prosecuted for their recusancy, as for a crime, before a local and inferior Federal judicatory. A few more such arrogant encroachments by the judicial upon the legislative branch of the government, and a few more such shameful submissions, would reduce the National Legislature to such a depth of degradation and pusillanimity that, to quote from a celebrated judicial opinion,[3] "its blazonry might well be a cap and bells and pointless spear."

Instances of the encroachments by the judicial upon the executive power, equally bold and less honest, are discovered in the practice which was invented and successfully applied in *Dodge* v. *Wolsey*,[4] of a stockholder in a corporation bringing a collusive suit against the directors to compel them, by judicial process, to refrain from doing what both parties wanted to avoid doing, the complying with a revenue law of a State; and in a case never to be mentioned without regret, this device was successfully resorted to for the purpose of overthrowing a revenue law of the United States.[5]

[1] Kilbourn *v.* Thompson, 103 U. S. 168.

[2] Chapman *v.* United States, 5 App. Cas. (D. C.) 122.

[3] Munn *v.* People, 69 Ill. 90, 92.

[4] 18 How. (U. S.) 331.

[5] Pollock *v.* Farmers' Loan &c. Co., 157 U. S. 429; *s. c.* on rehearing, 158 U. S. 601.

In these and other like cases the profession that the object of the suit was to restrain the directors from complying with an unconstitutional revenue law was a mere pretense; the spectacle of an adversary litigation was an equal pretense; both the complaining stockholder and the defendant directors desired the same thing; and that result, thus accomplished, was nothing less than the enjoining of the executive branch of the government, State or Federal, from collecting revenue which might be vital to the existence of the State or nation.

It is said that a good judge will amplify his own jurisdiction. This maxim may well be challenged. A judge occupies a public trust, or a public agency, and he is, like any other trustee or agent, entitled to wield only those powers which have been conferred upon him by a just and proper interpretation of the instrument creating the trust or agency. The true meaning of the maxim is that a good judge will amplify *remedies* to the end of doing complete justice. Men are greedy of power; judges are but men; judges are therefore greedy of jurisdiction. The known tendency of all courts is to amplify their own jurisdiction. The court which assumes without challenge, to judge finally and exclusively, not only of the extent of its own powers, but also of the extent of the powers of both of the other branches of the government, may well challenge attention. So long as this right is acquiesced in, we shall witness the spectacle of Federal judicatories continually enlarging their own powers, by successive encroachments upon the corresponding powers of the legislative and executive branches of the general government, and of all branches of the State governments.

To promote this expansion of power, we have seen the legislature of a State prohibited from repealing a public grant, got from its predecessors by the most notorious corruption.[1] We have seen the legislature of a State prohibited from making a useful modification of the charter of an eleemosynary corporation, long after the death of all its founders; and, subsidiary to this, we have been taught the doctrine that an executed gift is a contract within the meaning of the Federal

[1] Fletcher *v.* Peck, 6 Cranch (U. S.), 87.

constitution.[1] We have seen the sovereign power of taxation bargained away by corrupt legislatures to private corporations, and future legislatures prohibited for all time from resuming the power.[2] We have seen, under the name of preserving the inviolability of contracts, rights got by bribery from venal legislatures endowed with sanctity and immorality and placed forever beyond the reach of the people.[3] We have seen useful and necessary revenue laws of the States, and of the United States,[4] suspended and nullified. We have seen the executive officers of our governments, both Federal and State, subjected to compulsory judicial process.[5] We have seen corporations aggregate declared to be "citizens," within the meaning of the same instrument, for the purpose of enlarging the jurisdiction of the courts of the United States and seizing a portion of the jurisdiction rightfully belonging to the States.[6] We have even seen the Supreme Federal Tribunal arrogate to itself, with a general public acquiescence, the jurisdiction of deciding, between two contestants, which is the lawful Governor of one of the States: a question which, from its very nature, eludes Federal jurisdiction and control.[7]

These are some of the results of what may be called "government by lawyers." It is government by that department of the government which is composed exclusively of lawyers, and which arrives at its determinations exclusively by the aid of the lawyers.

[1] Dartmouth College *v.* Woodworth, 4 Wheat. (U. S.) 517.

[2] State Bank *v.* Knoop, 16 How. (U. S.) 369, and the midnight brood that followed it.

[3] Fletcher *v.* Peck, 6 Cranch (U. S.), 87; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 517.

[4] State Bank *v.* Knoop, *supra;* Pollock *v.* Farmers' Loan &c. Co., *supra.*

[5] See United States ex rel. &c. *v.* Carlisle, 5 App. Cas. (D. C.), where the power of a local court of the District of Columbia to issue a *mandamus* to the Secretary of the Treasury passed without challenge.

[6] Louisville &c. R. Co. *v.* Letson, 2 How. (U. S.) 497, and its successors. It is to be noted that Mr. Justice Daniel took the view that where one of the parties to a controversy in a court of the United States, is a corporation created by a State, "this court can take no cognizance, by the constitution, of the acts, or rights, or pretensions of that corporation." State Bank *v.* Knoop, 16 How. (U. S.) at p. 219. See, on this very peculiar judicial amendment of the constitution, 29 Am. Law Rev. 864.

[7] Boyd *v.* Nebraska, 143 U. S. 135.

It is not government by sovereign legislatures. It is not government by representatives of the people elected by them to make their laws. It is not government by an executive who proceeds, under the command of the constitution, to "take care that the laws be faithfully executed,"[1] and who must resign his powers to the people at the expiration of four years. It is not what our British brethren who, since our separation from them, have advanced further in popular government than we have, are accustomed to designate by the name of "responsible government." On the contrary, it is the most irresponsible of all government. It is government by a body which is responsible to no one; for the national House of Representatives has no time to impeach, nor has the Senate time to try an impeachment of a Federal judge; even if, in the things that I have enumerated, there could be found any ground of impeachment within the meaning of the constitution. Even in the time of Mr. Jefferson, when few of the remarkable advances in jurisdiction which I have enumerated had taken place, that far-seeing statesman, descanting upon the encroachments by the judicial upon the other branches of the government, declared again and again in his published letters that impeachment was not even a scare-crow.[2] He saw the spectacle of the Federal judiciary, in the enlargement of its own powers, "advancing its noiseless step like a thief over the field of jurisdiction;"[3] proceeding by a steady process of sapping and mining;[4] its opinions "huddled up in conclave;"[5] and he raised the alarm against the manifest encroachments of that branch of the government upon the others,— the only branch of the government totally out of touch with the people, in no wise responsible to them, or to any one for them; and he predicted that, unless those encroach-

[1] Const. U. S., Art. 2, § 3.

[2] Jefferson's Letter to Mr. Hammond, and to Mr. Ritchie, 28 Am. Law Rev. 147, and to Mr. Barry, 28 Am. Law Rev. 148.

[3] Jefferson, Letter to Mr. Hammond, 28 Am. Law Rev. 148.

[4] "The judiciary of the United States is the subtle corps of sappers and miners, constantly working under ground to undermine our confederated fabric." Letter to Mr. Ritchie, 28 Am. Law Rev. 147.

[5] Letter to Mr. Ritchie, 28 Am. Law Rev. 147. "The very idea of cooking up opinions in conclave begets suspicion," etc. Letter to Judge Johnson, 28 Am. Law Rev. 149.

ments should be resisted, all the powers of the government would ultimately be absorbed by the judiciary. Certainly government by the Federal judiciary is not "government *by* the people."[1] It is not, as governments should be in a republic, government *near* the people. And it may well be doubted to what extent it is "government *for* the people."

It has not escaped attention, that the general trend of this irresponsible government, by lawyers, is in favor of the rich and powerful classes, and against the scattered and segregated people. The Dartmouth College decision was ostensibly rendered to protect the charter rights of a small college; and Daniel Webster shed tears when, in his argument of that celebrated case, referring to the college as his *alma mater*, he suggested to the court that it was but a small college.[2] It was rendered in favor of clamorous corporate interests, which, by the most notorious log-rolling and manipulation of the press, had prepared the way for it. The decision was so utterly opposed to the first conceptions of the meaning of the constitution that it is doubtful whether, if it could have been foreseen, the Federal compact could have been formed.[3] The subsequent de-

[1] "A judiciary independent of a king or executive alone is a good thing; but independence of the will of the nation is a solecism, at least in a republican government." Jefferson, Letter to Mr. Ritchie, 28 Am. Law Rev. 148. Contrast the views of Mr. Justice Brown on judicial independence: 23 Am. Law Rev. 781.

[2] See Mr. Otis' account of that incident, taken from Lodge's Life of Webster, 27 Am. Law Rev. 592.

[3] See 26 Am. Law Rev. 179. Compare the able review of the Dartmouth College case, by Alfred Russell, in 30 Am. Law Rev. 321. Shirley's "Dartmouth College Causes [St. Louis, Review Publishing Co.] is a history, by a man of extraordinary ability, of the whole litigation. Jefferson's opinion of the doctrine of the case, in a letter to Governor Plumer, date July 21, 1816 (before the decision of the U. S. Supreme Court had been rendered), will bear repetition: "The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but it is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves; and that we, in like manner, can make laws and impose burdens on future generations, which

cisions of the court that one legislature could bargain away for all time, the right of taxation — the very right of a State to exist — were likewise rendered in the interests of incorporated money and power.

The Income Tax decision,[1] in which the court, by a bare majority of its judges, overruled two of its previous unanimous decisions, the first having been rendered at a time when two members of the late constitutional convention sat as judges in the court, was rendered in a suit obviously collusive, and at the beck of the wealthy and influential classes. Nor can anything, couched in decorous language, be said of that decision more severe than can be found in the opinions of the dissenting judges. By that decision five lawyers struck down the power of Congress to raise revenue by one of the means employed by all governments; a mode which might become absolutely essential to the existence of the nation in time of war with a great maritime power. Our judicial annals do not afford an instance of a more unpatriotic subserviency to the demands of the rich and powerful classes. Within a few months after it was rendered the country was treated to an object lesson of what its effects might be in case of war with England, which seemed possible, over the Venzuela question. If such a decision had been rendered in the midst of such a war — a thing which we cannot suppose possible — public opinion would have universally stamped the concurring judges, not as judges and patriots, but as marplots and traitors. The gross vice of the decision lies not in the fact, that it decided the income tax law to be unconstitutional, but in the fact that it assumed jurisdiction to decide the question, one way or the other. Beyond all question, the power of raising revenue, to provide for the ordinary expenses of government, or for the common defense, or for the general welfare of the United States, was intended to be lodged as a political matter, in the political and administrative departments of the government, and it was never intended that the judicial department should be allowed to interfere with it.

they will have no right to alter; in fine, that the earth belongs to the dead, and not to the living."

[1] Pollock *v.* Farmers' Loan &c. Co., 157 U. S. 429; *s. c.* on rehearing, 158 U. S. 601.

The Sugar Trust decision,[1] in effect, denied the power of Congress to prevent all the corporations in the Union, which were engaged in the production of a particular article of food, and of prime necessity, from combining together into one organization, for the purpose alone of suppressing competition in selling, and thereby controlling the markets of that product in every State in the Union, for the scarcely candid reason that they were primarily engaged in *manufacturing*, and not in interstate commerce; when in fact they were engaged, primarily, in *selling*, and manufacturing was merely a preparation for selling.

In the Stanford case[2] it appeared that the United States, desiring to aid in the building of a transcontinental railway, agreed to lend its aid to certain co-adventurers, provided they should incorporate themselves under the laws of the State of California, and proceed, with the aid so furnished them, to build a section of road. The constitution and statute law of California provided that the stockholders of corporations in that State, should be originally liable, each for his proportion of the debts of the corporation. It seemed the simplest of all legal propositions that the liability so established against the stockholders would inure to the public, as well as to a private creditor. And yet three Federal courts in succession held, without any dissent, that this security did not inure to the benefit of the United States; and in this way struck down the rights of the United States in favor of the rankest of public criminals. These are but a few instances; it is to be regretted that the list could be greatly extended.

Nor has it escaped attention that some decisions of that court, which are pointed to as landmarks of constitutional interpretation and bulwarks of public right, have been rendered in the assistance of fraud, rascality, and criminality. The first judicial declaration that a public grant is a contract, and hence not subject to legislative repeal under the constitution of the United States, was rendered in a case where a great public land grant has been procured from a legislature by direct and notorious

[1] United States *v.* E. C. Knight Co., 156 U. S. 1.

[2] United States *v.* Stanford, 161 U. S. 412.

bribery.[1] The court having, in the same decision, held that legislative acts cannot be impeached for fraud, established the doctrine that the most important of all contracts, can neither be repealed by legislation, nor impeached for fraud; and thus public fraud, bribery, and corruption were surrounded with a halo of sanctity, and endowed with immortality. The much-vaunted Slaughter House decision[2] supported, under the guise of upholding the rights of the States, an odious monopoly in the hands of one of the most corrupt combinations that ever procured a great and exclusive franchise by bribing a negro legislature. It is equally unfortunate that the case of Kilbourn *v.* Thompson,[3] to which I have already referred, in which, overruling its previous sound and wholesome decision,[4] the court denied the power of the national House of Representatives to punish for contempt a witness who, without claiming any constitutional exemption, refused to answer questions propounded to him by a committee of the House, and afterwards by the whole House, degrading that body to the position occupied by the Assembly of Newfoundland,[5] and other British Colonies; and denying to it the right existing in the House of Commons of Great Britain from time immemorial. The result of the decision was to suppress a Congressional investigation into a fraudulent and corrupt combination, known as the "Real Estate

[1] Fletcher *v.* Peck, 6 Cranch, 97.

[2] Slaughter House Cases, 16 Wall. (U. S.) 36. Mr. Justice Field, in his dissenting opinion, said: "No one will deny that abstract justice lies in the position of the plaintiffs in error" [meaning the butchers who resisted the monopoly]. *Ibid.*, p. 86. Mr. Justice Bradley, in his dissenting opinion, said of the act of the Legislature of Louisiana creating the monopoly: "It is one of those arbitrary and unjust laws, made in the interest of a few scheming individuals, by which some of the Southern States have, during the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light." *Ibid.*, p. 120. Mr. Justice Swayne, in his dissenting opinion, said: "A more flagrant and indefensible invasion of the rights of the many for the benefit of the few has not occurred in the legislative history of the country." *Ibid.*, p. 128.

[3] 103 U. S. 168.

[4] Anderson *v.* Dunn, 6 Wheat. (U. S.) 204.

[5] The court rested its decision chiefly on the decision of the English Privy Council in Kielly *v.* Carson, 4 Moore P. C. 63, thus limiting the power — not of the British House of Commons — but of the House of Assembly of Newfoundland.

Pool," formed in the District of Columbia, to make money out of public contracts. Nor has it escaped animadversion that it was the case of a Republican court curtailing the powers of a Democratic House of Representatives. Nor can one suppress amazement at the effrontery of a judicial court attempting to decide, over the heads of a House of a sovereign legislature, the proper scope of a legislative investigation, — a subject, from its very nature, beyond the conusance of any court of justice, especially of a petty local court like the Supreme Court of the District of Columbia, and, subject to the constitutional rights of the citizen, within the absolute discretion of the Houses of Congress. A decision of three Federal judges, at Circuit, smothered a Congressional investigation into the frauds of the incorporated criminals called the "Central Pacific Railroad Company," on the specious pretense that a Congressional investigation was not a "case" within the meaning of the judiciary clause of the Federal constitution;[1] a doctrine which the Supreme Court of the United States has since been obliged, in substance, to overrule.[2] In Stanford's case,[3] to which I have already alluded, the Supreme Court, in effect, exonerated the same public criminals from repaying to the government the money which they had plundered from it. In the Counselman case[4] the court struck down that clause of the Interstate Commerce Law, compelling officers of interstate transportation companies to testify concerning violations of the statute, and exonerating them from criminal prosecution by reason of any disclosures made; holding that the bare possibility that their testimony might furnish a clue, by means of which a detective might discover in them the commission of some other crime, protected them under the constitution. The subsequent statute, protecting the witness from prosecution for any similar offense, designed to afford a complete protection to him, was but recently sustained by a bare majority of the

[1] Re Pacific Railroad Commission, 32 Fed. Rep. 241.

[2] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447; reversing Re Interstate Commerce Commission, 53 Fed. Rep. 476.

[3] 161 U. S. 412.

[4] Counselman *v.* Hitchcock, 142 U. S. 547.

court.[1] Such decisions, though rendered by learned and upright judges, strike the lay mind as being too complacent toward corporate rascality, and support the now widely-prevailing belief that there is in this country too much constitutional law for rogues and criminals.

When the constitution was framed, the new government which it created was not to go into existence until the constitution had been ratified by three-fourths of the States; nor could it be amended except with the consent of three-fourths of the States. English publicists have not failed to observe, again and again, that this has the effect of putting our government into a straight jacket. In the 106 years which have elapsed since the constitution went into effect, but fifteen amendments have been added to it. Twelve of these followed soon after the adoption of the original instrument, and the other three followed as the fruits of the great Civil War. The fourteenth of these amendments never was adopted in accordance with the requirements of the constitution. If we lay out of view the fact that several of the Southern State governments were under military coercion, it is to be observed that the ratification of the State of Ohio, which was necessary to complete the requisite three-fourths, was withdrawn before the quorum of three-fourths had been filled up. It then became a question whether a State could withdraw its ratification. It is believed to be a rule of law that, in making a *multipartite* contract, which requires the consent of a certain number before it becomes binding, any party can withdraw his consent before the requisite number of consents has been obtained. Nevertheless, Mr. Seward, as Secretary of State, decided that Ohio could not withdraw its ratification; and he accordingly issued his proclamation declaring the amendment ratified.

I am using this instance to point out the extreme difficulty of amending the constitution in accordance with its own provisions. So great is this difficulty, and so great is the conservatism of the people in regard to any innovation upon that venerable instrument, that it may be regarded as hopeless to add any further amendments to it, however useful or necessary, by the consent

[1] Brown *v.* Walker, 161 U. S. 591.

of the legislatures of three-fourths of the States, until some great public convulsion, or revolution, has prepared the public mind for it. How happy and proud, then, the legal profession must be, when they reflect upon the fact — for it is a fact — that their ingenuity affords an escape from this almost hopeless situation! The codes of ancient times were *glossed* over by annotators to make them conform to subsequent conditions, until their original doctrines were scarcely recognizable; and the word "gloss" has come to signify an uncandid and fictitious, though possibly a necessary, interpretation. Just so the constitution of the United States is being amended, not by political action on the part of the people, but by unfaithful interpretations on the part of the Supreme Court. Thus, when it became necessary to build the constitution up by what is known as "construction," in those matters wherein, by reason of its generality, it was defective, the Supreme Court supplied the necessary amendments under the disguise of construing the instrument. For example, the word "corporation," is not found in that instrument, but the judicial power of the United States was extended to controversies between "citizens" of different States. But, as the practice of organizing private corporations for almost every purpose came into vogue, it was convenient to annex a judicial amendment to the constitution, making the word "citizen," as used therein, mean a corporation composed of many persons, not one of whose members might in fact be a citizen of the State granting the charter, but all of whom might be non-residents, or even aliens. This amendment, robbing as it did the State courts of a portion of their rightful jurisdiction over their own citizens, could not, it may be safely said, ever have been ratified by the legislatures of three-fourths of the States. On the other hand, the amendment having been added to the constitution by us lawyers, speaking through our judges, cannot be got out of it; because, in order to that end, three-fourths of the States must concur, and the consent of three-fourths of the States cannot be procured. The corporation-ridden States would refuse their consent.[1]

[1] The constitution has also been amended by mere political action, — preserving its form while sacrificing its substance. For example, nothing is

The constitution guarantees the right of trial by jury in all cases of crime except impeachment. This has always been held to mean trial by jury as it existed at common law at the time when the constitution was framed. But we lawyers, acting through our Federal tribunals, finding the remedy by ordinary criminal prosecutions before juries inadequate in cases of labor insurrections, have enlarged the equity powers of the courts of the United States by extending those powers to matters of crime, thus correspondingly curtailing the right of trial by jury, and successfully substituting a more summary and beneficial remedy called "government by injunction." It is true that a national convention recently held by one of the leading political parties has denounced that form of government in strong terms. But nevertheless we lawyers, acting through that part of our judiciary which is not responsible to the people, have, by a useful amendment to the constitution, established it. That amendment cannot be repealed without the consent of three-fourths of the States, which consent can never be obtained. What, then, are the cavilers going to do about it?[1]

I say, then, fellow-lawyers, let us not despair too much of the evils of a straight-jacket constitution. The Supreme Court has wisely prohibited the Congress from dispensing with the constitution, and has wisely taken to itself the power to amend it, and to dispense with acts of Congress impugning it. It is true that this involves a revival of the dispensing power, against

more certain than that, in the scheme of electing a President and Vice-president by electors, it was intended that each State should choose a body of statesmen, who should exercise their independent judgment in the selection of those magistrates; and the actual practice of the first forty years of the Republic conformed to this idea. Then the practice came into vogue of the political parties holding national conventions to name party candidates; and the electors chosen by the party in each State were no longer to exercise an independent judgment, but were placed under an implied pledge to vote for the candidate named by the party convention; a pledge which, to the honor of American politicians be it said, no elector has ever yet dared to violate.

[1] This paragraph was construed by some members of the Texas Bar Association, who heard it, as an attack upon the decision of the Supreme Court of the United States in the Debs case (158 U. S. 564). But the speaker explained to them that he approved of that decision. See his views on Debs' conspiracy in 28 Am. Law Rev. 630; 29 *Id.* 138, and 29 *Id.* 756.

which our English ancestors struggled so long and with ultimate success; but it revives it in the hands of us lawyers, albeit exerted through a non-elective judiciary, and not in the hands of military tyrants. Therefore a revival of it does not menace the liberties of the people. It is also true that, in the exercise of this power of amendment, the Supreme Federal tribunal takes upon itself the thankless office of superintending all the other departments of the government, of correcting their errors, and of keeping them in the straight and narrow path marked out by the constitution. In the exercise of this power, the Supreme Court can correct mischiefs that the President cannot. For example, the President cannot, under the constitution, veto a single unconstitutional item in an appropriation bill without vetoing the whole bill; but, according to the reasoning of a recent decision, the Supreme Court can, though it has not yet seen fit to exercise the power. The President cannot veto a part of a law; but, as it is a settled maxim of constitutional law that a statute may be void in part and valid in part, the Supreme Court can veto the bad part of it, while leaving the good part stand.

The power to amend that venerable instrument really lies then in the hands of us lawyers, exerting our power and influence before and through a tribunal in which responsibility to the people is unknown; where the right of petition on the part of the people does not exist; where we lawyers alone are heard, and where the court exercises its power of amendment according to the accidents of lawsuits between private parties in real or collusive litigations. The constitution was of our building. Its corner-stones were laid by lawyers. Every arch was rounded, every key-stone set in place by them; every stone in the magnificent structure was lifted into place by the hand of some legal architect. We lawyers built this monumental temple to a well ordered liberty.

"Not Babylon
Nor great Alcairo such magnificence
Equalled in their glories, to enshrine
Belus or Serapis, their gods, or seat
Their kings, when Egypt with Assyria strove
In wealth and luxury. The ascending pile

Stood, fixed its stately height, and straight the doors
Opening their brazen folds, discover wide
Within her ample spaces o'er the smooth
And level pavement. From the arched roof
Pendent by subtle magic, many a row
Of starry lamps and blazing cressets, fed
With naptha and asphaltus, yielded light
As from the sky. The hasty multitude
Admiring entered, and the work some praised,
And some the architect."

We lawyers were its architects; we are its guardians; we are its amenders and its perfecters. Time has made rents in its walls: we will close them up. Its stately battlements, which kiss the clouds, reveal their summits still ragged and incomplete: we will lift them to more stately architectural proportions and will then perfect and finish them. We will preserve the sacred temple from violence and spoliation; and we will graciously permit our fellow-citizens who are not lawyers — those of the humbler and less useful callings, to come and sit with us in its shade.

But it is barely possible that the people will, in time, get tired of being governed by us lawyers; at least, they may become tired of the kind of government by lawyers of which I have spoken. The intelligence of the people, as compared with the lawyers, is slowly rising, and, in the older States, non-lawyers are more and more participating in public affairs. In England the greatest political leaders are by no means lawyers: we must exclude the Palmerstons, the Beaconsfields, the Gladstones, and the Salisburys, from the ranks of the legal profession. If, as Mr. Jefferson believed, the encroachments of the Federal Supreme Court, some of which I have hastily sketched, threaten the gradual centralization of all the powers of government in the hands of the one non-elective branch of the Government, the remedy is easily in the hands of the people. The judiciary possesses only a moral power. It is even without power to execute its own process: the marshals of its courts are appointed by the President. Whenever its pretensions have been seriously resisted, they have gone down. Whenever the Supreme Court endeavors to impose its authority upon the Federal Executive the

answer of the President will be that he too is sworn to support the constitution; that it is a part of the constitution that he shall "take care that the laws be faithfully executed,"[1] and that he is not sworn to take care that the decisions of the Supreme Court be faithfully executed. The obligation of his official oath imposes upon him a duty, in the execution of his office, of determining for himself what are the laws to be faithfully executed by him, and what are to be rejected by him as not being laws. For the discharge of this duty, he is, under the constitution, answerable on his oath of office and on his conscience; and the judgments of the Supreme Court are therefore not binding upon him, but are persuasive merely. The Federal tribunals, when attempting to interfere with and restrain executive action, were successfully resisted by Jefferson, by Jackson, and by Lincoln.[2] If the people should ever conclude with Jefferson that the Federal judiciary, as at present constituted, is dangerous to public liberty, they can, by a mere act of Congress, abolish every inferior Federal court, all being the mere creatures of Congress. If, in addition to this, they should conclude that the Federal Supreme Court, in setting aside the laws

[1] Const. U. S., Art. 2, § 3.

[2] See Ex parte Merryman, Taney Dec. 246. In his first Inaugural Address (March 4, 1861), Mr. Lincoln said: "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government; and while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government upon the vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made, as in ordinary litigation between parties in personal actions, the people will have ceased to be their own masters, unless having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink, to decide cases properly brought before them; and it is no fault of theirs if others seek to turn their decisions into political purposes."

of the States, is infringing upon their reserved rights, they can deprive the court of that power by repealing the 25th section of the Judiciary Act, which allows a writ of error from the Supreme Court of the United States to the highest courts of the States.[1] Nay more: the entire appellate jurisdiction of the Supreme Court is established, by the language of the constitution itself, "both as to law and fact, with such exceptions and under such regulations as the Congress shall make."[2] Whenever the people get tired of the manner in which it exercises its appellate jurisdiction, they can, through their Congress, curtail that jurisdiction by such "exceptions" as they may see fit to prescribe, and by such "regulations" as they may see fit to impose.

I do not expect that any of these measures will ever become necessary. I hope that it will not be inferred, from anything I have said, that I advocate such extreme measures. I merely refer to them as powers held by the people among their other reserved powers, to be exercised by them when an emergency shall arise, for the protection of their liberties. Happily, notwithstanding the exceptions already referred to, the decisions of the Federal Supreme Court on public questions have generally commended themselves to public favor. Nor have judicious minds failed to observe the great benefit, in a popular government, which accrues from having a tribunal, which, uninfluenced by the passions of the hour, can calmly decide great public questions, — not because it always decides them rightly, but because of the necessity of having them decided. Nor will any impartial student of our constitutional history, even though he admit all that I have said concerning certain manifest tendencies of the court, and even though he agree with all my objections to certain of its decisions, fail to concede the general beneficence of its work. Where would the constitution have been, if the Supreme Court, under the leadership of Marshall, had not asserted the power to uphold and preserve it? What sort of

[1] It will be recalled that a bill to repeal this section was introduced in the national House of Representatives in the year 1831, and was defeated by a vote of 137 to 51. But it was not without distinguished sponsors: both Henry Clay and James K. Polk voted in favor of it.

[2] Const. U. S., Art. 3, § 2, Cause 2.

government would we now have if its exposition had been finally committed to the uncertain action of bare popular majorities? Balancing the labors of Marshall against those of Jefferson; the one in some sense the founder, the other the perfecter of our system of government, — two men of the most opposite schools of political thinking, who stood towards each other even in personal antagonism, — and I do not know to which we ought to accord the greater honor. If, without moving laughter, I could imagine myself at so lofty a pinnacle as that of either, I confess that I would rather have been the author of the Declaration of Independence than of the Dartmouth College decision; the author of the Statute of Virginia for Religious Liberty, than of the decision in Fletcher *v.* Peck.[1] Nor do I know whether to accord the greater importance to the oft-repeated doctrine of Jefferson that the right of resisting tyranny and of overthrowing tyrannical government is always reserved to the people, and that revolutions are sometimes, nay frequently, necessary to liberty — a declaration which is embodied in the Bill of Rights of nearly all our State constitutions; or to the declarations of Marshall that the Government of the United States, of necessity, exercises its powers directly upon the people, throughout the whole extent of our great country, and not mediately through the States, nor with the aid, nor even consent of the State governments; that, within the scope of its granted powers, it is necessarily supreme; and that it is entitled, by a just implication, to exercise all powers which are fairly necessary to carry into effect those powers expressly granted. I scarcely know which of these opposing principles — opposing, yet reconcilable — has played the greater part in the phenomenal growth of our country. The doctrine of Jefferson has upheld individual liberty, developed individual strength, and enlarged individual manhood. The doctrine of Marshall has given us a country, and has given to each man the reasonable hope that he will be allowed in peace to enjoy the rewards of his honest industry. Nor ought we to forget that these enunciations were not the enunciations of mere doctrinaires,

[1] 6 Cranch, 87.

but the enunciations of two great lawyers. If put to my oath as to a choice between them, I confess that I might be obliged to say with Jefferson that I would rather have liberty without government than government without liberty. The loose atoms of the thirteen colonies were first crystallized around the sword of Washington.[1] They were next baptized in fire and melted together in a single crucible in the War of 1812, our second War of Independence. The ingot thus produced was moulded into symmetry by the plastic skill of Marshall and his associates. And that court, notwithstanding the tendencies which I have pointed out, is still, in general, maintaining, in strength and symmetry, the colossal fabric created by the constitution,— "an indestructible union of indestructible States."

But notwithstanding this concession, which I freely and heartily make, the dangerous tendencies and extravagant pretensions of the court, which I have pointed out, ought not to be minimized, but ought to be resisted. That resistance ought not to take place, as advised by Jefferson, by "meeting the invaders foot to foot,"[2] but it ought to take place under the wise and moderate guidance of the legal profession. But the danger is that the people do not always so act. In popular governments evils are often borne with stolid patience until a culminating point is reached, when the people burst into a sudden frenzy and redress their grievances by violent and extreme measures, and even tear down the fabric of government itself:—

> "When the crowd,
> Maddened with centuries of drouth, are loud,
> And trample on each other to obtain
> The cup that brings oblivion of a chain
> Heavy and sore, in which, long yoked, they plowed
> The sand. Or if there sprung the yellow grain,
> 'Twas not for them: their necks were too much bowed,
> And their dead palates chewed the cud of pain."

There is danger, real danger, that the people will see at one sweeping glance, that all the powers of their governments, Fed-

[1] "Crystallizing them
Around a single will's unpliant stem,
And making purpose of dissension rash." — *Lowell.*

[2] Jefferson, Letter to Mr. Thweat, 28 Am. Law Rev. 148.

eral and State, lie at the feet of us lawyers, that is to say, at the feet of a judicial oligarchy; that those powers are being steadily exercised in behalf of the wealthy and powerful classes, and to the prejudice of the scattered and segregated people; that the power thus seized includes the power of amending the constitution; the power of superintending the action, not merely of Congress, but also of the State legislatures; the power of degrading the powers of the two houses of Congress, in making those investigations which they may deem necessary to wise legislation, to the powers which an English court has ascribed to British colonial legislatures; the power of superintending the judiciary of the States, of annulling their judgments, and of commanding them what judgments to render; the power of denying to Congress the power to raise revenue by a method employed by all governments; making the fundamental sovereign powers of government, such as the power of taxation, the subject of mere barter between corrupt legislatures and private adventurers; holding that a venal legislature, temporarily invested with power, may corruptly bargain away those essential attributes of sovereignty and for all time; that corporate franchises bought from corrupt legislatures are sanctified and placed forever beyond recall by the people; that great trusts and combinations may place their yokes upon the necks of people of the United States, who must groan forever under the weight, without remedy and without hope; that trial by jury and the ordinary criminal justice of the States, which ought to be kept near the people, are to be set aside, and Federal court injunctions substituted therefor; that those injunctions extend to preventing laboring men from quitting their employment, although they are liable to be discharged by their employers at any hour, thus creating and perpetuating a state of slavery. There is danger that the people will see these things all at once; see their enrobed judges doing their thinking on the side of the rich and powerful; see them look with solemn cynicism upon the sufferings of the masses, nor heed the earthquake when it begins to rock beneath their feet; see them present a spectacle not unlike that of Nero fiddling while Rome burns. There is danger that the people will see all this at one sudden glance, and that the

furies will then break loose, and that all hell will ride on their wings.

A few days ago, in a great audience chamber in Chicago, the representatives of a great political party were assembled from every State and Territory of the Union, to discuss great questions and to consider great abuses, including some of those which I have mentioned. A young, smooth-shaven man, apparently just out of college, ascended the platform to close a memorable debate. When he faced the great audience it rocked with applause. But when he lifted his hand to speak

> "His look
> Drew audience and attention still as night,
> Or Summer's noon-tide air."

As he ascended each grand climax, a tempest broke forth from twenty thousand throats, "like ocean warring 'gainst a rocky isle." And then a wave of his hand, stilling the uproar, almost recalled the miracle of Christ stilling the tempest. But this tempest was stilled only to burst forth at each succeeding climax of the speaker, and in like manner to be stilled again. That hour brought back into our practical and prosaic age the troubles and the glories of the antique world. It made us feel the secret force of the "grand troublous life antique," and see, —

> "Under the rock stand of Demosthenes,
> Unstable Athens heave her noisy seas."[1]

In that hour, he became the leader of a great party; perhaps the hope of a great people. The man whose voice raised that tempest and whose hand stilled it, was a member of the great, honorable, and powerful profession of the law. Was that popular tempest a prelude to some greater popular tempest which is yet to break upon us? If so, will the legal profession, as they have so often done in the past, guide the ship of State safely through that tempest, or will they drift hopelessly along with it, and be ingulfed in it?

[1] This passage was badly quoted from memory.

At that same hour, a few hundred miles away, seated in his unpretentious residence in a small city, surrounded by an aged mother, the wife of his youth, and the friends and neighbors who had witnessed his early successes at the bar and his enviable political career, — sat another lawyer. He heard, through that wonderful instrument the long distance telephone, the peals of applause which greeted the young orator in the distant convention, like the roar of a distant ocean after storm. He heard it without disdain, perhaps with a touch of admiration, certainly without fear. He, too, had been chosen the leader of a great party, perhaps the hope of a great people. Both of these great leaders, while differing vitally on public questions, are patriotic and lofty in character; sincere in their convictions of public duty; firm in their adhesion to principle; tender, chivalric and faithful toward women; truthful and honorable in their public and private lives. Both are members of the legal profession. It is the office of that profession, and of the free institutions which that profession has fostered, to produce such men. Whichever shall be chosen the chief magistrate of the American people will illustrate, in that great office, the lofty ideal of a man that "can rule and dare not lie."

What I have said will fail entirely of its intended effect if it does not bring you, my fellow-lawyers, to reflect how great the power, how important the trust, which your merits on the one hand, and popular consent, custom, and acquiescence on the other, have reposed in our profession. I magnify that profession. I exult that I am a member of it. But at the same time I trust that I feel an adequate sense of the responsibilities which attach to that membership. It is said that the legal profession is declining in power and influence; that the practice of the law is passing into the hands of corporations,— of collection companies, security companies, trust companies, and the like. I know not how that may be. It seems to me that, in our complicated modern business-life, there is greater and greater need for good lawyers. Certain it is that our complicated system of federative government makes "government by lawyers" imperative, and concedes to our profession the principal offices of statesmanship, the noblest work that has yet been committed to man. Whether,

as a profession, we maintain our present proud pre-eminence rests primarily with ourselves. If we sink to the mere pursuit of sordid gain, the leadership of the people and the offices of the government will pass into other hands. If we remain in the future, what we have been in the past, the tribunes of the people and the champions of public right, we shall retain that natural ascendency in government, so long enjoyed, so honorable to us, and so beneficial to the State.